

BETWEEN : SIFIMETA KAIPELEA KILIFI : Plaintiff

AND : 1. SIONE MAPUMEIHENGALU HEIMULI  
2. KINGDOM OF TONGA : Defendants

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel : L. Tonga for the Plaintiff  
: L. Niu for the First Defendant  
: V. Malolo for the Second Defendant.

Date of Hearing : 27 November, 1998

Date of Judgment : 8 December, 1998

JUDGMENT OF WARD CJ

Following a number of steps previously taken in this action the details of which do not need to be recited at this stage, the Court has been asked to determine a single question of law relating to the interpretation of section 82 of the Land Act (Cap132).

The principal action concerns a town allotment known as Nailili and a tax allotment called Konga-'o-Nualei both of which were held by Siosiu Makafana Kilifi who has died. The first defendant and the plaintiff are his nephews through his oldest and second oldest brothers respectively and the family relationships relevant to the question now before the court have been agreed as follows:

1. Siosiu Makafana Kilifi (herein called "Siosiu") had a town allotment called "Nailililili" and a tax allotment called "Konga 'o Nualei".
2. Siosiu had no legitimate son or grandson by his first wife, Oietu, or by his second wife, Mele.
3. Siosiu had legitimate brothers, namely Viliami, Mesui and Vaini. Viliami and Mesui predeceased Siosiu but both leaving legitimate sons surviving, the eldest of whom are Misieli and the Plaintiff respectively.
4. Siosiu died in 1980 leaving his second wife as widow, who died in 1994.
5. Misieli has a town allotment and tax allotment. The Plaintiff has neither.
6. Both "Nailililili" and "Konga 'o Nualei" are in the estate of the Crown.

The point upon which a ruling is sought is whether the plaintiff can succeed to these allotments as the heir of the deceased holder. Once that has been determined, the matter will be referred back to the Minister to decide on the devolution of the allotments in question.

The rules relating to the devolution of allotments are set out in Division VII of the Land Act (Cap 132) and, subject to the life estate of a widow, succession follows the order set out in section 82. The provisions of paragraphs (a) to (d) do not need to be considered save to say that they cover the succession where the deceased holder leaves legitimate sons or only unmarried daughters. The remaining paragraphs read:

- "e) in default of any unmarried daughter of the deceased holder an allotment shall descend to the deceased holder's brother or if such brother be dead to the eldest male heir of the body of such brother. If the deceased holder's eldest brother be dead without leaving any male heir of his body then the holder's next eldest brother shall succeed or if he be dead the eldest male heir of his body and so on taking the deceased holder's brothers in succession in order of their ages;
- f) if the holder dies without leaving any brother or heir male of the body of a brother him surviving the inheritance shall go to the eldest brother of the deceased holder's father or if such brother be dead to the eldest male heir of the body of such brother. If the eldest brother of the deceased holder's father be dead leaving no male heir of his body then the next eldest brother of the deceased holder's father shall succeed or if he be dead the eldest male heir of his body and so on taking the brothers of the deceased holder's father in succession in the order of their respective seniority;
- g) in default of brothers of the deceased holder's father or male heir of the body of such a brother the allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof:"

As Siosiua had no legitimate offspring when he died, the land would have passed to his eldest brother, Viliami. However, Viliami had predeceased him and so it then passed to Viliami's eldest son, Misieli. He did not take the allotments because he already had allotments of his own and the plaintiff urges the court to rule that the succession should, therefore, pass to the next oldest brother of the deceased, Mesui. He also predeceased Siosiua and so it should pass to the plaintiff as Mesui's eldest male heir.

Miss Tonga, for the plaintiff, seeks support for her contention from the wording of paragraph (f) where she suggests the reference to "a brother" in the first sentence gives an unconditional right of succession to the heir of any brother where that heir has no land of his own and the deceased's older brothers and their heirs already have allotments.

Whilst the court can feel some sympathy with such an arrangement, it is not what paragraph (f) provides. That paragraph simply states that the succession does not pass to the brothers of the deceased holder's father if there are any brothers of the deceased or their lawful heirs who are entitled to succeed.

The hurdle at which the plaintiff falls is paragraph (e). The whole of section 82 is serial in its application and, therefore, when the succession is resolved by a particular provision, that is the end of the succession. There is nothing in the section that allows it to be revived by some subsequent provision once the succession has been resolved on a surviving heir.

In the present case, there were no legitimate offspring of Siosuia and so the allotments would have descended to the deceased holder's eldest brother, Viliami, had he been alive at that time. He was not and the paragraph sets out that, in such a situation, it passes to the eldest male heir of the body of Viliami. The next sentence sets the answer to Miss Tonga's submission. *If the deceased's oldest brother is dead without leaving any male heir, then the deceased holder's next brother takes his place in the line or his heir if he is dead.* There is no provision for the deceased's next brother to succeed where the oldest brother has left a male heir. The paragraph concludes; "and so on taking the deceased holder's brothers in succession in order of their ages". It is noteworthy that those concluding words make no mention of the heirs of the brothers.

Bearing that and the serial nature of the section in mind, it is clear that it is only if the eldest brother is dead without leaving a lawful heir that the succession passes to the next brother. Where the eldest brother or his lawful heir is entitled to succeed to the allotment, the succession is complete. It does not depend on the brother or his heir exercising his right to succeed nor does it affect the succession if, as here, he is precluded, under section 84, from taking the allotment because he already has one. The right to succeed attaches to him as a result of his status as the eldest brother or his lawful heir.

Miss Tonga cited section 84 in support of her contention that, as Misieli could not take the allotments, the succession passed to the next eldest of Siosuia's brothers. Again, I consider that the precision of the words makes it clear her interpretation is not correct. The prohibition in that section states that, subject to the special rules applying to a son or grandson, no person who already holds an allotment "shall be permitted to succeed as heir" to another allotment of the same kind. It does not, as Miss Tonga's submission would require, remove his status as an heir, only his right as such to succeed. Similarly, he may not choose between an allotment already held by him and "one to which he becomes entitled as heir" – a provision that clearly accepts his entitlement as an heir but prevents him succeeding.

This was the basis of the decision in the long established case of *Ma'afu v Minister of Lands* (1959) 2 TLR 119 in which Hunter J ruled that the prohibition on an heir, 'Ilavalu, (the son of the deceased landholder's deceased eldest brother) succeeding to an allotment because he already had one, concluded the chain of succession to the exclusion of his own son and heir;

"As 'Ilavalu could not succeed it goes without saying that his son ... has no claim and the allotment reverts to the Crown."

The same conclusion was reached by Hampton CJ in an earlier ruling in relation to the land now under consideration (*Amalgamated Land cases 193/95 and 575/95*). He too terminated the chain at Misieli. He refers to section 82 (e) and continues:

"If I apply that to the situation here that would mean that the allotments here should descend to, in order, Viliami as that eldest brother but as he was deceased then to the eldest male heir of Viliami. That eldest male heir is [Misieli]. As I read the clear words of this paragraph, the chain within paragraph (e) down to other brothers can only continue if that eldest brother, Viliami, does not leave any heir male of this body; then the succession would go on to the next brother. That of course would be Mesui in this case. But here the eldest brother, Viliami, did leave a male heir of his body. The scheme or the chain stops there. The fact that Viliami's son ... is disqualified under section 84 does not make a difference to the operation of paragraph (e)."

I have considered the terms of the section afresh in relation to this case and I am satisfied that the plaintiff has no entitlement to this land under the rules of succession in Division VII of the Act. I am fortified in that opinion by the cases quoted above.

I rule that the terms of section 82 (e) preclude the plaintiff from succeeding to the town allotment, Nailili, or the tax allotment, Konga-'o-Nualei' as an heir of Siosua Makafana Kilifi. The chain of succession under that section ended with Viliami's son, Misieli, and, as he is not permitted to succeed as heir and the allotments are on Crown Land, they revert to the Crown.



*Spad. Ward*

NUKU'ALOFA 8 December, 1998

CHIEF JUSTICE